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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 656

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY, PETITIONER,

vs.

LAWRENCE S. HELMERS, LEWIS LEVI, OSCAR SCHWARTZ, ALICE STERNE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 28, 1946.

CERTIORARI GRANTED DECEMBER 9, 1946.

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District Court of the United States

SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY,

Plaintiff,

v.

CHARLES W. ADLER, LAWRENCE S. HELMERS, OSCAR SCHWARTZ, ALICE STERNE, LEWIS LEVY and 300 others,

Defendants.

BILL OF COMPLAINT

Filed December 12, 1936

No. 1001
In Equity

I.

The National Bank of Kentucky is a national banking association organized under the laws of the United States, commonly known as the National Bank Act, and is domiciled at Louisville, Jefferson County, in the Western District of Kentucky.

II.

Said Bank was closed by resolution of its Board of Directors on the 16th day of November, 1930.

III.

Thereafter on November 17, 1930, the Comptroller of the Currency of the United States, being satisfied from information on file in his bureau, that said National Bank of Kentucky located in the City of Louisville, County of

Jefferson and State of Kentucky, was insolvent and unable to pay its just and legal debts, and in pursuance of the power and authority vested in him by law and under the provisions of Section 1 of the Acts of Congress— "An act authorizing the appointment of receivers for national banks and other purposes," approved June 30, 1876, appointed Paul C. Keyes Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver. Said Paul C. Keyes thereupon duly qualified and entered upon the duties of his office as such receiver and took possession of all of the books, records and assets of said Bank and continued in the possession and control thereof as such Receiver until December 15, 1932, on which date he resigned. Thereafter on December 15, 1932, F. G. Awalt, then acting Comptroller of the Currency pursuant to the power and authority vested in him by law as aforesaid, appointed the plaintiff, A. M. Anderson, Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorizes the appointment of a receiver, and the said plaintiff forthwith qualified and thereupon entered upon the duties of his office as such Receiver, took possession of all of the books, records and assets of said Bank. Plaintiff still is in the possession and control thereof as such Receiver and is still the duly appointed, qualified and acting Receiver of said The National Bank of Kentucky.

IV.

This is a suit of a civil nature in equity brought by the plaintiff as receiver of an insolvent national bank. As such receiver he is an officer of the United States. This suit arises under the constitution and laws of the United States for the enforcement of a liability imposed by the laws of the United States and is brought in performance of his official duties. This is a case for winding up the affairs of a national banking association.

This suit is brought in equity for the reason that the plaintiff does not have an adequate remedy at law because an accounting is necessary and prayed for herein to determine the proportionate part of the aggregate liability claimed against the defendants named herein for which each individual is severally liable and to determine the credit to which the defendants may be entitled, if any, by reason of the collections made by the plaintiff on account of the statutory liability hereinafter set forth. The matters set forth herein involve complicated interests and degrees of interest among approximately six thousand stockholders of BancoKentucky Company hereinafter described and to require the plaintiff to proceed at law would involve several thousand independent actions in which the defendants and all of said stockholders have a common interest. The equitable determination in one action of the questions of common interest will avoid a multiplicity of suits and circuity of actions and the unreasonable expense of thousands of separate suits which would dissipate the trust fund herein sought to be recovered for the benefit of creditors of said Bank, and unless the plaintiff is granted the relief in equity as prayed for herein, he will suffer irreparable damage and injury.

On account of all of which the plaintiff has no adequate remedy at law and this court has jurisdiction of this suit.

V.

The defendants are named in the caption hereof and the names of said defendants are incorporated in the body of this complaint by reference to the caption hereof, the same as if fully set forth herein and are not repeated to prevent unduly encumbering the record.

The defendants are citizens and residents of the State of Ohio.

The corporate defendants are either corporations organized and existing under the laws of the State of Ohio or are corporations organized and existing under the laws of other states which have qualified to do business in the State of Ohio and are engaged in business therein.

Certain defendants are sued in a representative capacity, as fully set forth in the caption incorporated herein by reference thereto. Certain other defendants, as indicated in Exhibit A by legend distributee of the estate of a named person have received assets from the estate of the named deceased persons who were during their lifetime liable as hereinafter set out, or from estates which were liable as hereinafter set out and such persons named as distributees are liable to the extent of the assets received by them from such estates.

VI.

On or about the 20th day of February, 1931, J. W. Pole, as the Comptroller of the Currency of the United States, upon an accounting by Paul C. Keyes as Receiver of the National Bank of Kentucky, and upon a valuation of the uncollected assets of said Bank remaining in the

hands of Paul C. Keyes as Receiver, found to the satisfaction of the Comptroller of the Currency that in order to pay the debts of the National Bank of Kentucky, it was necessary to enforce the individual liability of the stockholders thereof to the extent hereinafter mentioned as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c156, Act of June 30, 1876 and Section 23, Act approved December 23, 1913 known as the Federal Reserve Act, and said Comptroller of the Currency, by virtue of the authority vested in him by law, did therefore levy and make an assessment and requisition upon the shareholders of said The National Bank of Kentucky for $4,000,000.00, to be paid by them on or before the First day of April, 1931, and did make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure; and said Comptroller of the Currency did thereupon direct the Receiver of the National Bank of Kentucky to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders.

VII.

At the time of the closing of the National Bank of Kentucky, it had issued and outstanding 40,000 shares of capital stock of the par value of $100. each, and 39,820 of said shares were held by Henry Vogt, Thomas J. Minary, Stewart E. Duncan, Allen P. Dodd, Charles H. Bohmer and Ben J. Metcalfe, as Trustees under a certain trust agreement dated April 22, 1927, entered into between the owners and holders of the capital stock of the National Bank of Kentucky and the owners and holders of the capital stock of the Louisville Trust Company. At the

time of the closing of the National Bank of Kentucky, in addition to the stock of the National Bank of Kentucky, the above mentioned Trustees held under the same trust agreement 17,235 shares of the capital stock of the Louisville Trust Company.

VIII.

Pursuant to the terms of said trust agreement, the above mentioned trustees issued to each stockholder of the National Bank of Kentucky and to each stockholder of the Louisville Trust Company whose stock was deposited with said trustees, a transferable Trustees Participation Certificate having a par value of $100. in lieu of each share of stock of the bank or trust company having a par value of $100. Said Trustees Participation Certificate certified that the holder was the owner of shares of stock of the par value of $100. each, of the indivisible trust estate consisting of the shares of the capital stock of the National Bank of Kentucky and the Louisville Trust Company and of any other corporation acquired by the trustees under the agreement between the stockholders of said institutions previously described. This certificate was issued under the terms of the aforesaid agreement and the holder thereof, by accepting the same, consented to and adopted the terms of the certificate and the terms of the agreement, as if fully written in said certificate.

Subsequent to April 22, 1927, each share of the trust estate having a par value of $100. per share, was divided into ten shares of the trust estate, each having a par value of $10.00 per share but except for the change in par value, said Trustees Participation Certificates remained unchanged and were issued under and subject to the trust agreement dated April 22, 1927.

Each Trustees' Participation Certificate having a par value of $10.00 represented .0697923 of a share of the capital stock of the National Bank of Kentucky, having a par value of $100. per share.

IX.

Each and every Trustees Participation Certificate contained on the face thereof a statement that it was issued pursuant to the trust agreement of April 22, 1927 which was recited to be on file with said National Bank of Kentucky and each and every Trustees Participation Certificate contained on its face the further agreement assented to by the holder thereof and reading as follows:

> "This certificate is issued under the terms of the aforesaid agreement and the holder hereof by accepting same, consents to and adopts said terms as if fully written herein."

One of the terms of said trust agreement of April 22, 192[redacted] which the above assent was given by the holders of Trustees Participation Certificates, reads as follows:

> "(1) The Trustees shall not be responsible for any acts done by them as Trustees in good faith and in the exercise of an honest judgment. No Trustee shall be liable for the act or omission of another Trustee.
>
> "(2) They shall not be liable, except as Trustees to the extent of the Trust funds held by them by reason of the ownership of stock in any corporation. They shall be indemnified against any such liability by each holder of Trustees' Participation Certificates to the extent hereinafter set forth.
>
> "(3) Each owner of a Trustees' Participation Certificate issued hereunder shall be subject to the same liability thereon as he would have been sub-

ject to in case he had been the owner of record of such proportionate part of the shares held by the Trustees in any corporation as the number of shares called for by his Trustees' Participation Certificate bears to the whole number of shares covered by all outstanding Trustees' Participation Certificates; and to such extent he shall indemnify and hold harmless the Trustees owning such stock from any loss or liability on account of being the holders or owners thereof. The measure of liability assumed hereunder shall be the same as that provided by law with reference to the holders of stock in any particular corporation in which the Trustees may hold stock as is provided by law with reference to the holders of such stock, and no more."

X.

At the time of the closing of the National Bank of Kentucky as aforesaid, there were issued and outstanding 570,550 shares of the trust estate having a par value of $10.00 per share, and said shares represented 39,820 shares of the capital stock of the National Bank of Kentucky having a par value of $100. per share.

XI.

On or about July 19, 1929 the officers and directors of the National Bank of Kentucky and the officers and directors of the Louisville Trust Company and the Trustees under the trust agreement of April 22, 1927, proposed to the holders of said Trustees Participation shares of the National Bank of Kentucky and the Louisville Trust Company, that the two banks and the business conducted by them should be reorganized by adding to this group a third corporation which said officers, directors and trustees represented would make the operations of these banking institutions more profitable, and ex-

pand their facilities for the profit of the shareholders of said banks. The plan of reorganization proposed by the officers and directors of the two banks and approved by formal resolutions of the trustees under the trust agreement of April 22, 1927 was to organize under the laws of the State of Delaware, a holding corporation to be known as the BancoKentucky Company, with an authorized capital of 2,000,000 shares having a par value of $10. each and to exchange the stock of this holding corporation for stock of the bank, represented by the Trustees Participation Certificates on the basis of two shares of the stock of said holding corporation, the BancoKentucky Company, for each Participation share.

The Trustees Participation shareholders were advised that it was an essential part of the plan that the shares of this holding corporation, the BancoKentucky Company (or at least a substantial majority thereof) be owned by the Trustees Participation shareholders and that it be managed and operated by the boards of directors and officers of the two banks. The holders of 570,550 shares of the trust estate approved and adopted the plan above described and the holders of 540,384 shares of the trust estate representing 37,714.6422 shares of stock of the National Bank of Kentucky exchanged their Trustees Participation Certificates which represented the stock of National Bank of Kentucky and the Louisville Trust Company, for 1,080,768 shares of the holding company, BancoKentucky, which shares continued thereafter to represent the holders' interest in said bank stock.

XII.

Pursuant to the above described plan, the holders of the Trustees Participation shares representing approximately 95% of the stock of the National Bank of Ken-

tucky and the Louisville Trust Company, caused said holding corporation to be organized as their agency and instrumentality, for their own use and enrichment and in furtherance of a scheme to engage in unlawful acts and to enable them through said corporate agency and instrumentality unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and other states relating to the ownership, operation and supervision of banks and trust companies.

Accordingly said holding corporation, the Banco Kentucky Company, was incorporated under the laws of the State of Delaware on July 16, 1929 with an authorized capital of 2,000,000 shares of common stock of the par value of $10. each for the alleged purposes set forth in its articles of incorporation as follows:

> "The acquiring by purchase or otherwise of all or any portion of the capital stock, property, assets and franchises of any or all corporations transacting business in any state of the United States; the purchasing, holding, selling, assigning, transferring, mortgaging, pledging or otherwise disposing of shares of the capital stock of or any bonds, securities or evidence of indebtedness created by or issued by any other corporation or corporations organized under the laws of any State of the United States or of any foreign country and while the owner thereof to exercise all the rights, powers and privileges of ownership the purchasing or otherwise acquiring of any promissory notes or other evidences of indebtedness executed by any person, firm, association or corporation; the financing, managing or operating of any commercial or manufacturing business or enterprise;

the underwriting of any issue of stocks, bonds, debentures or other securities issued by any corporation; the charging of fees or commissions for any or all services rendered or advice or assistance given to any person, firm, association or corporation; acquiring and paying for in cash, stock or bonds, of this corporation or otherwise, the good will, rights, assets and property of any person, firm, association or corporation and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm or corporation.

"The corporation shall have power to act as registrar or transfer agent for any other association or corporation and to act as agent in general for any other person, firm, association or corporation.

"The corporation shall have full power to issue bonds, debentures or obligations of this corporation from time to time, for any of the objects or purposes of the corporation and to secure the same by mortgage, pledge, deed of trust or otherwise. The corporation shall have full power to purchase, hold, sell and transfer the shares of its own capital stock, provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital; and provided, further, that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

"The corporation shall have full power to guarantee the obligations of any other person, firm, association or corporation and to become surety therefor and to become joint maker, endorser or acceptor of any such obligations and to charge fees and commissions for such services.

"The corporation shall have full power without restriction or limit as to amount to purchase or otherwise acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the States of

the United States, or any foreign country, subject to the laws of such States or foreign countries.

"In general, the corporation shall have full power to carry on any other business in connection with the foregoing whether commercial, manufacturing, financial or otherwise, and to have and exercise all the powers conferred by the laws of Delaware upon corporations formed under the act hereinafter referred to and to do any or all of the things hereinbefore set forth to the same extent as natural persons might or could do.

"The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to that limit or restrict in any manner the powers of this corporation."

XIII.

The defendants and other shareholders of said banks in carrying out the plan and scheme aforesaid through the agency and instrumentality of their holding corporation, the BancoKentucky Company, proceeded unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and of other states relating to the ownership, operation and supervision of banks and trust companies and unlawfully to use the assets of said banks and trust companies in speculative financial transactions prohibited by law, and unlawfully to use the assets and property of one or more of said banks in making loans on the security of the holding company stock in violation of law.

XIV.

After the aforesaid exchange of Trustees Participation Certificates for stock of the holding corporation, the BancoKentucky Company, the holders of the stock of the BancoKentucky Company continued to be the actual, real and beneficial holders of approximately 95% of the stock of the National Bank of Kentucky and continued after the organization of the holding company, to receive all of the benefits and advantages incident to the ownership of stock in said National Bank.

XV.

At the time of the organization of the BancoKentucky Company and at all times thereafter, the persons who appeared as stockholders of the said company exercised all the rights and privileges of shareholders of the National Bank of Kentucky and of the other banks and trust companies whose capital stock, was held by BancoKentucky. Said persons who appeared as stockholders of BancoKentucky secured and retained to their own use and enrichment all the benefits and advantages of shareholders of the National Bank of Kentucky and were from the time of the organization of the BancoKentucky Company up to the time of the closing of the National Bank of Kentucky the real, actual and beneficial owners of the Trustees Participation Certificates which represented shares of stock of the National Bank of Kentucky.

From the time of its organization to the date of the closing of the National Bank of Kentucky, the BancoKentucky Company acted as a corporate agency and instrumentality for the persons whose names appeared as stockholders of said company and as such corporate agency and instrumentality for said owners of the said Banco-

Kentucky Company stock it held the Trustees Participation Certificates which represented the shares of stock in the National Bank of Kentucky and the persons whose names appeared as stockholders of the BancoKentucky Company were the actual, real and beneficial owners of the stock of the National Bank of Kentucky.

XVI.

The holders of the Trustees Participation Certificates who organized the BancoKentucky Company as a holding corporation for their bank stock, well knowing that said bank stock was subject to the individual liability of shareholders of national banks, imposed by the Acts of Congress, Sections 5151 and 5234 of the Revised Statutes of the United States and knowing that bank stock of state banking institutions was subject to individual liability imposed by state laws, nevertheless, in the organization of the said BancoKentucky Company, intentionally undertook to evade the provisions of said sections of the Acts of Congress by deliberately omitting from the Articles of Incorporation any provision for the payment of the liability upon national and state bank stocks provided by the laws of the United States, the Commonwealth of Kentucky and other states, and deliberately and intentionally sought to evade said liability by including the Articles of Incorporation of BancoKentucky Company the following language:

> "VIII. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever."

and by printing in its certificates of stock the words "full paid and non-assessable," and in so attempting to evade

such assessment liability, perpetrated a fraud upon the depositors and creditors of the National Bank of Kentucky for whose benefit this action is brought.

XVII.

By reason of all of the foregoing, the defendants are not entitled in equity and good conscience to the immunity recognized by law which stockholders of a bona fide lawfully formed and conducted corporation ordinarily have and defendants are not entitled in equity and good conscience to shield themselves from the assessment imposed upon them by law with said corporate form the Banco-Kentucky Company. By reason of the foregoing, the defendants are the real, true and beneficial shareholders of the National Bank of Kentucky and have promised to pay said assessment and are estopped to deny said assessment liability, and are the owners of shares of stock of the National Bank of Kentucky and each of the defendants appearing to be stockholders of the BancoKentucky Company is liable for the payment of the assessment levied by the Comptroller of the Currency hereinbefore referred to, individually, ratably and proportionately to the extent that the number of shares of stock held by him bears to the total number of shares issued and outstanding.

XVIII.

Acting pursuant to the authority and direction of the Comptroller of the Currency, the Receiver of the National Bank of Kentucky, on or about March 20th, 1931, sent and served upon each of the defendants and all the other shareholders of the BancoKentucky Company, the following assessment notice:

"Office of the Receiver
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Louisville, Ky., March 20, 1931

"As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver, on or before April 1, 1931.* A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of the National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

PAUL C. KEYES
RECEIVER OF
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Registered Letter
Return Receipt Requested."

Enclosed therewith and attached thereto was a copy of the order of assessment upon shareholders made by the Comptroller of the Currency of the United States hereinabove described.

XIX.

Thereafter, the receiver of the National Bank of Kentucky secured leave of the Jefferson County Circuit Court, which had previously appointed a receiver for the Banco-Kentucky Company, to file an action against the receiver of the BancoKentucky Company to collect said assessment and leave having been secured, the receiver, on October 31, 1931, filed an action in this court against Joseph S. Laurent, Receiver of the BancoKentucky Company, praying for judgment by reason of the assessment in the amount of $3,772,162.40. Said cause being docketed in the United States District Court for the Western District of Kentucky as No. 1383. Thereafter, the cause was heard and on September 14, 1932, the Receiver of the National Bank of Kentucky recovered judgment for the full amount of the assessment, plus interest at the rate of six per cent (6%) per annum. Said judgment was entered September 14, 1932. Said judgment has been affirmed by the United States Circuit Court of Appeals and said judgment has become final and except for a credit of $90,745.17 hereafter described is wholly unpaid and unsatisfied.

XX.

On December 18th, 1934, the Receiver of the Banco-Kentucky Company paid to the plaintiff, as Receiver of the National Bank of Kentucky, the sum of $90,745.17, said payment being made to plaintiff as a creditor of BancoKentucky Company by reason of the judgment mentioned above and said payment is the only money paid to the plaintiff on account of the judgment for stock assessment up to the present time. The plaintiff says that there are other moneys which he may collect from the Receiver of the BancoKentucky Company, before the assets in the

hands of said Receiver are completely exhausted, but plaintiff says that there are numerous controversies with respect to the distribution of the assets of the Banco-Kentucky Company and says that for this reason he is unable to state at the present time what if any further sum may eventually be paid by the Receiver of the Banco-Kentucky Company on account of said judgment, but plaintiff alleges that BancoKentucky Company is hopelessly insolvent and any payment that might be made will be relatively small and that said judgment will remain substantially unsatisfied.

XXI.

Plaintiff says that the depositors and creditors of the National Bank of Kentucky have only been paid up to the present time, sixty-seven (67%) per cent of the face amount of their deposits and claims.

XXII.

Plaintiff further says that there is due him as Receiver of the National Bank of Kentucky by reason of the stock assessment on the 37,714.6422 shares of National Bank of Kentucky stock held by the BancoKentucky Company as the agency and instrumentality of the defendants and other shareholders of said company, and in accordance with their plan adopted as aforesaid, the sum of $3,771,-464.22, less $90,745.17 paid on December 18th, 1934.

XXIII.

On January 14th, 1930, the Articles of the BancoKentucky Company were amended and the authorized capital stock in said company was increased from 2,000,000 to 5,000,000 shares, each share having a par value of $10.00.

At the time of the closing of the National Bank of Kentucky, there were issued and outstanding 2,072,468 shares of the capital stock of the BancoKentucky Company.

XXIV.

Each of the defendants and each stockholder of the BancoKentucky Company not named a defendant herein is individually liable to pay said assessment in the proportion that his shares of stock of the BancoKentucky Company bears to the total number of shares of the BancoKentucky Company issued and outstanding at the date of the closing of the National Bank of Kentucky. The plaintiff is informed and believes that the sum due from each stockholder of BancoKentucky Company, including interest to the date of the filing of this petition, amounts to approximately $2.304909 for each share of stock of the BancoKentucky Company registered in his name or owned by him at the time of the closing of the National Bank of Kentucky.

XXV.

The several defendants named herein are holders or are personal representatives or distributees of estates of holders of BancoKentucky Company stock in the amounts set out opposite their respective names on the schedule and list hereto attached, made a part hereof, and marked "Exhibit A," and are each indebted to the plaintiff as Receiver of the National Bank of Kentucky in the estimated amounts set opposite their respective names on said Exhibit A, in the column thereof designated "Amount of Assessment," together with interest at the rate of six per cent (6%) per annum.

XXVI.

Plaintiff therefore prays:

1. That a subpoena be issued according to the course and practice of this court, requiring the defendants to appear and answer this Bill of Complaint, but not under oath, answer under oath being hereby expressly waived according to the rules and practice of this court.

2. That an accounting be made and stated to determine the number of shares of the stock of BancoKentucky Company that were issued and outstanding at the date of the failure of the National Bank of Kentucky; to determine the number of shares of the capital stock of the National Bank of Kentucky that were represented by the Trustees Participation Certificates held by the Banco-Kentucky Company as the agency and instrumentality of the defendants and the other stockholders of the Banco-Kentucky Company; to determine the proportionate part of a share of stock of the National Bank of Kentucky which was represented by a share of stock in BancoKentucky Company; to determine the proportionate amount of the assessment for which each holder of the stock of the BancoKentucky Company is liable giving due and proper credit to said defendants and the other stockholders of BancoKentucky Company for such part of the assessment that the Receiver has collected, or may hereafter collect, and for which said defendants and other shareholders are entitled to credit.

3. That the court fix and determine the number of shares of National Bank of Kentucky stock of which the several defendants, or their decedents or transferors, were the record and beneficial owners, and the assessment liability thereon, and that upon such accounting, the plaintiff be awarded a judgment and decree against the several

defendants for the amount, by said accounting found to be due from each of them.

4. That plaintiff may have such further, other and different relief in the premises to which he may be entitled and as shall be agreeable to equity and good conscience.

NICHOLS, MORRILL, WOOD, MARX & GINTER,
Solicitors for Plaintiff.

(Duly Verified)

EXHIBIT "A"

NUMBER OF ITEM	NAME	NUMBER OF SHARES	AMOUNT OF ASSESSMENT
85	Helmers, Lawrence S.	570	$1313.79
120	Levy, Lewis	50	115.24
193	Schwartz, Oscar	870	2005.27
210	Sterne, Alice	480	1106.35

Names of other defendants omitted

MOTION TO DISMISS OR TRANSFER

(Filed January 6, 1937)

Now come the defendants Lawrence S. Helmers, and Alice Sterne, and move the court for an Order to Dismiss the Bill of Complaint herein for each of the following reasons:

(a) The Bill of Complaint on its face does not make a case for equity jurisdiction.

(b) There is a misjoinder of parties defendant.

(c) There is a nonjoinder and absence of indispensable parties defendant.

(d) The jurisdictional amount as to certain of these defendants is lacking.

(e) There are no facts alleged sufficient to constitute a valid cause of action in equity.

(f) The Bill of Complaint shows on its face that the alleged action is barred by the statute of limitations and by laches.

If the foregoing motion to dismiss should be overruled, then these defendants move that this cause be transferred to the law side of this court under Equity Rule 22.

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
JOSEPH A. SEGAL,
Solicitors for Defendant.

PAXTON & SEASONGOOD,
Of Counsel.

January 6, 1937

An identical motion was filed on behalf of the defendant, Oscar Schwartz, on January 25, 1937.

MOTION TO DISMISS

(Filed January 6, 1937)

Now comes the defendants, Leo Mook, Mrs. Eugene Brunsman, C. Ralph Weil, Sidney Weil and Lewis Levy, and move the court to dismiss the Bill of Complaint filed herein for the following reasons and upon the following grounds:

1. That the Bill of Complaint is without equity and that this court is without jurisdiction to hear or decide the cause as a suit in equity.

2. That no ground of equitable jurisdiction is set forth in the Bill of Complaint and the complainant's remedy, if any, is at law.

3. That the Bill of Complaint alleges an insufficiency of facts to constitute a valid cause of action in equity.

4. That there is a misjoinder of parties defendant and causes of actions.

5. That the Bill shows upon its face that plaintiff has heretofore elected to prosecute his alleged cause of action against the BancoKentucky Company, and has prosecuted said action to a judgment, and has collected a portion of said judgment, and that he is bound by said election and is estopped from prosecuting this action against this defendant.

6. That the Bill shows upon its face that the action set forth therein is barred by the statutes of limitations of Ohio and Kentucky, respectively, to-wit, General Code of Ohio, Section No. 11234, and Section 2515 Kentucky Statutes.

GALVIN & TRACY & LEWIS LEVY,
Attorneys for Defendants, Leo Mook, Mrs. Eugene Brunsman, C. Ralph Weil, Sidney Weil, and Lewis Levy.

MEMORANDUM AND DECISION

(Filed August 11, 1945)

NEVIN, District Judge:

On February 1, 1945, counsel for various defendants herein appeared before the court and presented their views by way of oral argument. Thereafter, a transcript of those proceedings and the arguments of counsel was made by the Court Reporter and on March 3, 1945, that transcript was filed with the Clerk of this court.

On pages 17-19, inclusive of the transcript, appears the following: "Mr. Seasongood: (of counsel for defendants) . . . The motion is to dismiss. There are a number of them. Our firm represents over 150 of the defendants. There are other counsel who represent other defendants and there are various grounds of motions to dismiss, as for instance persons who have died that no claim was presented to

their estate. Our thought was, without going into those matters, we might defer consideration of those several defenses, so far as we are concerned and argue today simply the general question that the action is barred by the statute of limitations, not waiving it at all, but we thought if we are right in the view that we take that it is barred, it is not necessary to go into these special defenses which exist for some of the defendants. The Court: That is entirely satisfactory to the court, if it is to counsel for the defendants. Mr. Seasongood: We would not wish to be considered as waiving those. In case it should be necessary, then they could be argued. The Court: Is that satisfactory to counsel for plaintiff, Judge Marx? Judge Marx: Yes. The Court: I think that is the wise course to pursue because then I will be able to concentrate on this one question and not be confused by other arguments at this time and it won't be necessary to consider them at this time. I understand that if your motion on the statute of limitations is well taken, as you say, we would not come to the other question. If we do, we can come to that at a later time to be agreed upon. Very well. There are quite a number of other counsel here. Is that arrangement satisfactory to all of the other counsel? Mr. Seasongood: It is satisfactory. The Court: Let the record show this arrangement suggested by Mr. Seasongood appears to be satisfactory to all counsel who are present now and who had their appearance noted."

The cause is now before the Court on the various motions to dismiss filed by and on behalf of certain defendants (as stated by Mr. Seasongood) on "the general question that the action is barred by the statute of limitations."

It has been recently held by the Court of Appeals of this (Sixth) Circuit that "the defense of the statute of limitations . . . is properly raised by motion." Archie W.

Memorandum and Decision

Berry et al. v. Chrysler Corporation (decided July 23, 1945), — Fed. (2d) —.

In addition to their oral arguments counsel for the respective parties have filed numerous and exhaustive briefs, citing many authorities in support of and contra the motions.

A detailed discussion of the views of counsel and the authorities cited would require an extended opinion which, in the view of the Court, would neither be justified nor serve any useful purpose, (with the transcript on file).

Upon a consideration of the motions, the briefs and arguments of counsel and the applicable law, the Court is of opinion and so finds that the respective motions to dismiss on the ground that the action is barred by the statute of limitations are each and all, not well taken, and that they should be, and they are, overruled.

As the defendants are so numerous, counsel for plaintiff should prepare entries overruling the various motions to dismiss on behalf of the respective defendants on the ground that the action is barred by the statute of limitations and submit same to counsel for the respective defendants for their approval as to form, the respective defendants having the right, of course, to reserve their exceptions to the substance of the order. Thereafter, the orders may be submitted to the Court for approval.

/s/ Robert R. Nevin,
U. S. District Judge.

APPEARANCES:

For Plaintiff:

Hon. Robert S. Marx and Harry Kasfir, Esq.

For Defendants:

Murray Seasongood, Esq., and Joseph A. Segal, Esq., of the firm of Paxton & Seasongood, for some of the defendants.

Ralph E. Clark, Esq., for several defendants.

Lawrence E. Eichel, Esq., and Jack B. Josselson, Esq., for some of the defendants.

Saul Zielonka, Esq., for I. L. and Sam J. Greenwald.

Clifford Ellig, Esq., of Lemkuhl & Ellig, for Ibold.

Johnson, Levy & Koodis ., Esqs., for the First National Bank and Albert N. Wolfstein.

Messrs. Galvin, Tracey, Geoghegan and Millikin for some of the defendants.

STIPULATION AS TO FACTS

(Filed January 19, 1946)

It is hereby stipulated as follows:

1. The organization certificate of The National Bank of Kentucky states that the place where its operations of discount and deposit are to be carried on is the City of Louisville, Jefferson County, State of Kentucky.

2. The business of The National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Jefferson County, Kentucky and in no other place.

Exhibit 1

3. Exhibit 1 attached hereto and made a part hereof is a true copy of the order issued by the Comptroller of the Currency referred to in paragraph VI of the Complaint.

4. Exhibit 2 attached hereto and made a part hereof is a true copy of the notice referred to in paragraph XVIII of the complaint.

It is further stipulated and agreed that the foregoing facts may be considered by the court on hearing of the various motions to dismiss with the same effect as if such facts were alleged in the complaint.

/s/ HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,
Attorneys for Plaintiff.

PAXTON & SEASONGOOD,
Attorneys for Charles W. Adler and 161 other Defendants.

LEWIS LEVY,
Pro Se.

EXHIBIT 1

ASSESSMENT UPON SHAREHOLDERS

No. 5312

TREASURY DEPARTMENT

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, February 20, 1931

In the matter of
THE NATIONAL BANK OF KENTUCKY
OF
LOUISVILLE, KENTUCKY

To all whom it may concern:

WHEREAS, upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The National

Exhibit 1

Bank of Kentucky of Louisville," Kentucky, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The National Bank of Kentucky of Louisville," for Four Million ($4,000,000) dollars, to be paid by them on or before the first day of April 1931, and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Paul C. Keyes, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

IN WITNESS WHEREOF I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twentieth day of February, A. D. 1931.

(Signed) J. W. POLE,

[SEAL] *Comptroller of the Currency.*

Exhibit 2

EXHIBIT 2

OFFICE OF THE RECEIVER
THE NATIONAL BANK OF KENTUCKY
LOUISVILLE, KENTUCKY

Louisville, Ky., March 20, 1931

As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the Office of the Receiver, on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of The National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

(Signed) PAUL C. KEYES,
Receiver of the National Bank of Kentucky
Louisville, Kentucky

Registered Letter
Return Receipt Requested

JUDGMENT ENTRY AGAINST DEFENDANTS LEWIS LEVY, LAWRENCE S. HELMERS, OSCAR SCHWARTZ AND ALICE STERNE

(Entered January 19, 1946)

This matter came on to be heard on the bill of complaint of A. M. Anderson, Receiver of National Bank of Kentucky, and on the motions to dismiss of the defendants Lewis Levy, Lawrence S. Helmers, Oscar Schwartz and Alice Sterne and on the stipulation as to facts to be considered by the court on the hearing of the motions to dismiss and on the briefs and arguments of counsel. On consideration of the record and the papers the court finds that the motions to dismiss of the defendants, Lewis Levy, Lawrence S. Helmers, Oscar Schwartz and Alice Sterne are not well taken and the same are hereby overruled. To which said defendants except.

The defendants Lewis Levy, Lawrence S. Helmers, Oscar Schwartz and Alice Sterne having declined to plead further, it is hereby ordered, adjudged and decreed that the plaintiff recover judgment against them.

Coming to enter judgment the court finds that in addition to the sum of $90,745.17 paid by the Receiver of BancoKentucky Company to the Receiver of National Bank of Kentucky, as set out in paragraph 20 of the bill of complaint, the sum of $716,150.22 has been paid by said Receiver of BancoKentucky Company to the Receiver of National Bank of Kentucky, of Louisville, to apply on the judgment obtained by the Receiver of National Bank of Kentucky, of Louisville, against the Receiver of Banco-Kentucky Company for assessment, which sum is an additional credit on said judgment.

The court finds that after allowing all of the credits there is due as of this date from each of the holders of

the stock of BancoKentucky Company the sum of $3.0458691 for each share of stock of said company held by them as of the time of the closing of National Bank of Kentucky, of Louisville. The court further finds that the defendant Lewis Levy was the holder of fifty shares of BancoKentucky stock; the defendant Lawrence S. Helmers was the holder of five hundred and seventy shares of BancoKentucky stock; that the defendant Oscar Schwartz was the holder of eight hundred and seventy shares of Banco stock, and the defendant Alice Sterne was the holder of four hundred and eighty shares of Banco stock. It is therefore ordered, adjudged and decreed that A. M. Anderson, Receiver of National Bank of Kentucky recover from Lewis Levy the sum of $152.50; from Lawrence S. Helmers the sum of $1,738.50; from Oscar Schwartz $2,653.50 and from Alice Sterne $1,464.00, together with interest on the respective amounts at the rate of 6% per annum from the date of this entry until said sums shall be paid.

It is further ordered, adjudged and decreed that said A. M. Anderson, Receiver of National Bank of Kentucky, recover from each defendant named above the marshal costs incurred as to each defendant and that said A. M. Anderson, as Receiver, further recover from each defendant listed above as costs an additional amount of 1½c for each share of BancoKentucky stock held by them, which costs are to be taxed by the Clerk, and for the abovementioned respective amounts and costs plaintiff may have execution against each of said respective defendants.

It is further ordered that this cause be continued as to the remaining defendants.

ROBERT R. NEVIN,
U. S. District Judge.

NOTICE OF APPEAL

(Filed February 6, 1946)

Notice is hereby given that Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, defendants herein, hereby appeal to The United States Circuit Court of Appeals for the Sixth Circuit from the final judgment against them entered in this action on January 19, 1946 in the District Court of the United States for the Southern District of Ohio (Western Division).

PAXTON AND SEASONGOOD,
Of Counsel.

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
JOSEPH A. SEGAL,
Attorneys for Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.

LEWIS LEVY,
Pro Se.

BOND FOR COSTS OF APPEAL

KNOW ALL MEN BY THESE PRESENTS, That Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, as principals, and The Hartford Accident and Indemnity Company, as surety, are held and firmly bound unto A. M. Anderson, Receiver of the National Bank of Kentucky, in the sum of Two hundred fifty ($250.00) dollars, to be paid to the said A. M. Anderson, Receiver as aforesaid, his successors and assigns, for the payment of which we bind ourselves, our executors, ad-

ministrators and assigns, jointly and severally, by these presents.

Sealed with our seal and dated this 6th day of February, 1946.

WHEREAS, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit pending in said Court between A. M. Anderson, Receiver of the National Bank of Kentucky, plaintiff, and each of the defendants herein named and others, a judgment was rendered on the 19th day of January, 1946 against each of the defendants herein named, and each of said defendants having filed in said District Court a Notice of Appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse said judgment:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that, each of the said defendants herein named shall prosecute their said appeal to effect and pay the costs herein if the appeal is dismissed or the judgment affirmed, all such costs as the Appellant Court may award if the judgment is modified, then the above obligations shall be void; otherwise it shall remain in full force and effect.

LAWRENCE S. HELMERS, OSCAR SCHWARTZ, ALICE STERNE AND LEWIS LEVY

By JOSEPH A. SEGAL,

Counsel.

HARTFORD ACCIDENT & INDEMNITY COMPANY

By R. M. SCHILL,

Attorney in Fact.

(Power of Attorney Attached)

STATEMENT OF POINTS TO BE RELIED UPON

(Filed February 8, 1946)

The defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, who filed Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit from the judgment entered herein on January 19, 1946 in favor of plaintiff, rely upon each of the following points for reversal of said judgment:

1. The court erred in overruling the motions of said defendants to dismiss the Bill of Complaint, and in failing to dismiss said Bill of Complaint.

2. The court erred in not deciding that the cause of action alleged in the Bill of Complaint is barred by the Statute of Limitations.

3. The court erred in failing to decide that the cause of action alleged in the Bill of Complaint arose in the State of Kentucky (where the applicable period of limitations for an action such as this is five years after accrual) and that the alleged cause of action having been brought more than five years after its accrual was, therefore, barred by reason of Section 11234 of the General Code of Ohio which borrows the period of limitations provided for like causes of action by the laws of the state in which the cause of action arose.

4. The court erred in failing to decide that the cause of action arose in Kentucky in view of the fact that it appeared from the Bill of Complaint and the Stipulation that the National Bank of Kentucky was domiciled and transacted all its business in that state.

5. The court erred in failing to decide that the cause of action arose in the state of Kentucky in view of the further fact that it appeared from the Bill of Complaint and the Stipulation that the assessment sued upon was payable at Louisville, Kentucky.

6. The court erred in failing to decide that if the cause of action did not arise in the state of Kentucky, it arose in the District of Columbia where the applicable period of limitations for an action such as this is three years after its accrual, and that the alleged cause of action was, therefore, barred by reason of Section 11234 of the General Code of Ohio.

7. The court erred in rendering final judgment against said defendants.

PAXTON AND SEASONGOOD,
Of Counsel.

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
JOSEPH A. SEGAL,
Attorneys for Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.

LEWIS LEVY,
Pro Se.

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL

(Filed February 7, 1946)

It is hereby stipulated by and between plaintiff and the defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, who filed a notice of appeal on February 6, 1946, that the following shall constitute and be included in the record on appeal to the Circuit Court of Appeals for the Sixth Circuit:

1. Bill of Complaint filed herein December 12, 1936, omitting from the title and Exhibit A thereof the names, addresses and other facts with reference to defendants other than those by whom the appeal is being taken.

Stipulation as to Contents of Record on Appeal

2. Motion to Dismiss or Transfer filed January 6, 1937 on behalf of the defendants, Lawrence S. Helmers and Alice Sterne, omitting therefrom the names of other defendants joining in such motion, together with a statement that an identical motion was filed on behalf of the defendant, Oscar Schwartz, on January 25, 1937.

3. Motion to Dismiss filed on behalf of the defendant, Lewis Levy, on January 6, 1937.

4. Memorandum and decision of Hon. Robert E. Nevin dated August 10, 1936.

5. Stipulation as to facts filed January 10, 1936.

6. Judgment Entry against defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy entered January 10, 1936.

7. Notice of Appeal with date of filing.

8. Undertaking on appeal and.

9. Statement

10. Bill

11. Stipulation providing for the transmittal of record in all cases taken from the Judgment Entry filed January 10, 1936.

12. Any extension or extensions of time for filing the record on appeal and docketing the action.

13. Stipulation as to certification of record.

[illegible],
Simon, Wise, Mack & Greve,
Counsel for Plaintiff.

Joseph A. [illegible],
Payne and Shafer,
Counsel for Defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.

Lewis Levy,
Pro Se.

STIPULATION PROVIDING FOR ONE TRANSCRIPT OF RECORD ON ALL APPEALS TAKEN FROM THE JUDGMENT ENTRY ENTERED JANUARY 19, 1946

(Filed February 7, 1946)

It is hereby stipulated that all the appeals taken herein from the judgment entry filed January 19, 1946 may be prosecuted by one transcript of record prepared pursuant to a stipulation designating the contents of the record on appeal.

/s/ HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,
Counsel for Plaintiff.

JOSEPH A. SEGAL,
PAXTON AND SEASONGOOD,
Counsel for Defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.

LEWIS LEVY,
Pro Se.

STIPULATION AS TO CERTIFICATION OF RECORD

(Filed February 7, 1946)

It is hereby stipulated that the foregoing transcript of record was jointly prepared by counsel for plaintiff and by counsel for defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, in whose behalf notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit was filed from the judgment entered herein on January 19, 1946, and that the Clerk of the United States District Court is hereby au-

thorized to treat the foregoing transcript of record as the record upon the Appeal and for certifying it accordingly.

/s/ HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,
Counsel for Plaintiff.
JOSEPH A. SEGAL,
PAXTON AND SEASONGOOD,
Counsel for Defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.
LEWIS LEVY,
Pro Se.

CERTIFICATE OF CLERK

I, Harry F. Rabe, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify that the foregoing pages numbered from 1 to ——, inclusive, contain a true and correct copy of the record and proceedings indicated in the stipulation found on page —, as the same appear of record and on file in the office of said Clerk in said Court in the above entitled cause.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, the — day of February, 1946.

HARRY F. RABE, *Clerk.*

_____

Deputy.

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RECORD OF PROCEEDINGS

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(April 15, 1946)

(Before: ALLEN, MARTIN and MILLER, Circuit Judges.)

This cause is argued by Murray Seasongood and Joseph A. Segal for Appellants, by Ralph E. Clark as amicus curiae, and Robert S. Marx for Appellee and is submitted to the court.

JUDGMENT

(Filed June 24, 1946)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court this day filed.

OPINION

(Filed June 24, 1946)

No. 10198

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

LAWRENCE S. HELMERS, ET AL.,
Defendants-Appellants,
v.
A. M. ANDERSON, Receiver of the National Bank of Kentucky,
Plaintiff-Appellee.

APPEAL from the District Court of the United States, Southern District of Ohio, Western Division.

Decided June 24, 1946.

Before ALLEN, MARTIN and MILLER, Circuit Judges.

MILLER, Circuit Judge. This appeal presents the question whether appellee's action, seeking to collect a "double liability" assessment levied by the Comptroller of Currency upon the stockholders of The National Bank of Kentucky of Louisville, Kentucky, was barred by the Statute of Limitations. The District Court held that the action was not so barred and overruled appellants' motion to dismiss the Bill of Complaint.

The Bill of Complaint, filed on December 12, 1936, in the United States District Court for the Southern District of Ohio, states that The National Bank of Kentucky of Louisville, Kentucky, was closed by resolution of its board of directors on November 16, 1930; that on November 17,

1930, the Comptroller of the Currency of the United States, being satisfied that the bank was insolvent appointed Paul C. Keyes receiver, who thereupon duly qualified and took possession of the books, records and assets of the bank and continued in control as such receiver until December 15, 1932, at which time he was succeeded by the appellant-appellee, A. M. Anderson; that on February 20, 1931, the Comptroller of the Currency, by virtue of the authority vested in him by law, made an assessment and requisition upon the shareholders of the bank for $4,000,000 to be paid by them on or before the first day of April 1931, and directed the receiver "to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders"; that acting pursuant to the authority and direction of the Comptroller of the Currency the Receiver on March 20, 1931, sent by registered mail to the shareholders of BancoKentucky Company, a Delaware corporation which owned substantially all of the stock of The National Bank of Kentucky, the following assessment notice:

Louisville, Ky., March 20, 1931.

"As a stockholder in the BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the office of the Receiver, on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of Kentucky,

to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said Banco-Kentucky Company, to the extent that the undersigned, as Receiver of The National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

PAUL C. KEYES
Receiver of The National Bank of Kentucky
Louisville, Kentucky;"

that he enclosed and attached thereto a copy of the order of assessment made by the Comptroller; that on October 31, 1931, the Receiver filed an action against the Receiver of The BancoKentucky Company in the United States District Court for the Western District of Kentucky, praying judgment by reason of the assessment in the amount of $3,772,162.40 and on September 14, 1932, recovered judgment for the full amount of the assessment plus interest, which judgment was affirmed by the United States Circuit Court of Appeals and is wholly unpaid and satisfied except for a credit of $90,745.17; that the depositors and creditors of The National Bank of Kentucky had only been paid 67% of the face amount of their deposits and claims, and that there was due him as Receiver of The National Bank of Kentucky by reason of the stock assessment the unpaid balance of $3,680,719.05. The Bill of Complaint named as defendants some 300 stockholders of BancoKentucky Company who were residents of the State of Ohio. Thereafter certain defendants filed motions to dismiss by which they raised the defense of the Statute of Limitations. *Berry, et al.* v. *Chrysler Corporation,* 150 Fed. (2d) 1002, C. C. A. 6th.

Except for the defense of the Statute of Limitations, and other special defenses available to certain defendants, the issues i this case are the same as those involved in

Anderson v. *Abbott*, which was filed by the Receiver of The National Bank of Kentucky in the Western District of Kentucky against shareholders of BancoKentucky Company residing in Kentucky. 32 Fed. Supp. 328. Action in this case was suspended until that litigation, on the issues other than Statute of Limitations, could be finally disposed of by the Supreme Court of the United States. In that case the District Court rendered judgment for the defendants. The judgment was affirmed by the Court of Appeals for this Circuit. *Anderson* v. *Abbott*, 127 Fed. (2d) 696. On review, the Supreme Court of the United States held the defendants liable on the assessment and remanded the case to the District Court for appropriate action. *Anderson* v. *Abbott*, 321 U. S. 349; rehearing denied, 321 U. S. 804. Those opinions set out fully the relationship between The National Bank of Kentucky and BancoKentucky Company and the basis of liability, making it unnecessary to repeat it here. That ruling will control the decision in this case on its merits if the action is not barred by the Statute of Limitations. Thereafter the District Court overruled the motions, and by agreement of counsel and with the Court's consent the four appellants herein declined to plead further and final judgment for their proportionate share of the assessment was rendered against them to provide a test case. From this judgment the appeal is taken.

Although the suit was brought in equity the complaint seeks to enforce a legal right for which equity provides a concurrent remedy to avoid a multiplicity of suits. *Bailey* v. *Tillinghast*, 99 Fed. 801, C. C. A. 6th. In such a case the Federal Court sitting in equity will apply the applicable statute of limitations. *Russell* v. *Todd*, 309 U. S. 280. It is conceded by the parties herein that the Federal statutes provide no period of limitation for actions to enforce the liability of national bank stockholders, and accordingly the statute of limitations of the state in which

the action is brought is applicable. *Rawlings* v. *Ray*, 312 U. S. 96. It is also agreed that the complaint sets forth an action "upon a liability created by statute." 38 Stat. 273, § 64, Title 12 USCA. The General Statute of Limitations of Ohio provides that an action "upon a liability created by statute other than a forfeiture or penalty shall be brought within six years after the cause thereof accrued." G. C. § 11222. Ohio also has a special Statute of Limitations, generally known as the "Borrowing Statute" which reads—

> "If the laws of any State or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years." G. C. § 11234.

The Kentucky Statute of Limitations is also involved. Section 413.120 Kentucky Revised Statutes provides as follows:

> "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, . . . shall be commenced within 5 years next after the cause of action accrued."

Regardless of some early doubt in the matter, it is now settled that in an action by the receiver of an insolvent national bank to collect a Comptroller's assessment the statute of limitations does not begin to run until the day fixed by the Comptroller for payment. *Rawlings* v. *Ray*, supra; *Fisher* v. *Whiton*, 317 U. S. 217. In the present case, that date was April 1, 1931. The Bill of Complaint was filed on December 12, 1936. If the Ohio General Statute of Limitations is applicable the complaint was filed within the 6-year period provided. On the other hand, if the Ken-

tucky Statute of Limitations is applicable by reason of the Ohio Borrowing Statute above referred to on the ground that the cause of action arose in Kentucky, then the complaint was not fined within the 5-year limit provided by the Kentucky statute. This requires a ruling on the narrow question of "where the cause of action arose," as the words are used in the Ohio Borrowing Statute. Appellants contend that the five year Kentucky statute is applicable because the cause of action arose in Kentucky, where The National Bank of Kentucky was located and transacted business, where insolvency occurred, where the Receiver had his office and where the assessment was directed by the Receiver to be paid. They contend in the alternative that if the cause of action did not arise in Kentucky, it arose in the District of Columbia, where the applicable statute of limitations is 3 years. The appellee contends that the cause of action arose by virtue of a Federal statute and not by the law of Kentucky or any other state, that it arose in the United States, a country within the meaning of the terms contained in the Ohio Borrowing Statute, and not in the State of Kentucky or the District of Columbia, and that the laws of the United States, being the country where the cause of action arose, do not limit the time for the commencement of the action to a less number of years than do the statutes of Ohio, which necessarily means that the Ohio Borrowing Statute (making applicable the Kentucky Statute of Limitations or the District of Columbia Statute of Limitations) is not applicable.

A cause of action "is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf." *B. & O. R. R. Co.* v. *Larwill*, 83 O. S. 108, 115-116. See *Oman* v. *Delius*, 162 Tenn. 192, 199-200; *Maryland Casualty Co.* v. *Gerlaske*, 68 Fed. (2d) 497, 499 (C. C. A. 5th). The place where a cause of action arises is the place

where the operative facts that give rise to the action occur. Although it may be necessary that a number of separate facts exist in order to create a cause of action, yet it is the happening of the last of such facts which brings the cause of action into existence. Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe*, 300 U. S. 598, 603. A liability, whether created by contract or by statute, is not the same as a cause of action. A person may execute a note payable in the future. Such an obligation is a liability, but it does not become a cause of action until the note matures and the maker fails to pay. A business man may make a contract obligating him to manufacture and deliver certain goods at a time in the future. His obligation under that contract is a liability, but no cause of action exists against him until the date of performance arrives and he fails or refuses to perform. The income tax law imposes an obligation upon citizens to pay an income tax upon net income for the year previously ended. The amount of this tax is a liability, but no cause of action has accrued against the taxpayer until the date when the tax becomes payable and he has failed to pay. In the present case, a Federal statute created the potential liability of the defendant-stockholders, but the existence of this statute did not by itself create a cause of action against them. Nor did the existence of the statute coupled with the insolvency of The National Bank of Kentucky create a cause of action, although it formed the basis for one later to arise. Nor did the subsequent assessment by the Comptroller of the Currency, added to the existence of the statute and the insolvency of the bank create the cause of action, although it did change a potential liability into an actual one. Before the Receiver could rightfully sue the defendant-stockholders in this case, it was necessary that not only the foregoing facts exist but

in addition thereto the liability to pay the assessment must have matured by the passage of time to April 1, 1931, the date of payment specified in the assessment, and the defendants have failed to make payment on or before that time. It seems clear that if any stockholder had paid to the Receiver his portion of the assessment at any time during March 1931, no cause of action of the kind herein sought to be enforced would have at any time arisen or existed against him. The failure of the stockholder to pay on or before the date set for payment by the Comptroller is accordingly the critical event which transformed the liability into a cause of action. At that time and upon the happening of the last of those events the Statute of Limitations began to run. *Rawlings* v. *Ray,* supra; *Fisher* v. *Whiton,* supra. The time when a cause of action arises and the place where it arises are necessarily connected, since the same act is the critical event in each instance. The final act which transforms the liability into a cause of action necessarily has both aspects of time and place. It occurs at a certain time and in a certain geographical spot. Appellee apparently concedes the correctness of such reasoning by his reference in his brief to the opinion of Cleasby, one of the Judges of the Court of Exchequer in *Durham* v. *Spence,* the Law Reports Exchequer Cases, Vol. 6, 1870-1871, Page 52.

The question thus necessarily narrows itself into determining where the failure to pay the assessment ordered in the present case occurred. The notice which the Receiver sent to the defendant-stockholders on March 20, 1931, recited that the assessment was payable at the office of the Receiver, on or before April 1, 1931. Appellee points out that the preceding assessment by the Comptroller, on which the validity of the notice is based, did not designate the place of payment, and that the Receiver was in error in stating that the assessment so provided. That is correct.

However, the assessment directed "the Receiver, heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders." While the Receiver enforces the liability created by the assessment, he does so subject to the direction of the Comptroller. It is settled that the Comptroller in making the assessment has authority under the statute to fix a date for its payment, and to change an original date so fixed to a later date. *Rawlings* v. *Ray*, supra; *Fisher* v. *Whiton*, supra. Such authority is broad enough to include the designation of a place of payment as well as the time of payment, in the absence of any such contrary designation in the contract between the parties. When not so designated by the Comptroller, the Receiver had such authority under his direction by the Comptroller to take all necessary proceedings to enforce the assessment. It is stipulated in the case that the organization certificate of the National Bank of Kentucky provides that the place where its operations are to be carried on was Louisville, Kentucky, and that the business of The National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Kentucky, and in no other place. The Receiver, accordingly, took over the books and assets of the insolvent bank and carried out the liquidation at that place. His office was in Louisville, Kentucky. He had no office in Ohio, nor do we see any real reason for requiring him to set up an office there or in the several other states where stockholders might reside. His designation of his office (in Louisville, Kentucky) as the place of payment was both logical and reasonable and within the authority conferred upon him. We believe it necessarily follows from the foregoing analysis of the facts that the cause of action herein sued on arose in Kentucky.

The same question was presented to the District Court of Pennsylvania in *Anderson* v. *Andrews*, 62 Fed. Supp. 705, where this same receiver brought suit against stockholders residing in Pennsylvania. It was there held under a similar Pennsylvania Borrowing Statute that the Statute of Limitations of Kentucky was applicable to and barred the cause of action set out in the complaint. Reference is made to the opinion in that case and to the authorities cited therein. The ruling is also supported by the following decisions from this Court in analogous situations; *B. & O. R. Co.* v. *Reed*, 223 Fed. 689, cert. denied, 239 U. S. 640; *Auglaize Box Board Co.* v. *Kansas City Fiber Box Co.*, 35 Fed. (2d) 822, cert. denied, 281 U. S. 730; *Hilliard* v. *Pennsylvania R. Co.*, 73 Fed. (2d) 473, cert. denied, 294 U. S. 721. Appellee attempts to distinguish the three cases from this Circuit by pointing out that two of them involved tort actions in which the accident occurred in states other than Ohio where the suit was brought, and that the third case involving a breach of contract occurring in a state other than Ohio where the suit was brought. He contends that in each of those cases the cause of action arose by reason of an illegal act on the part of the defendant and that the resulting liability was accordingly based upon fault, while in the present case he contends the liability exists by virtue of the Federal statute and without fault on the part of the defendants. The claimed distinction again fails to properly distinguish the difference between a liability and a cause of action. It is true that the liability in the present case exists without fault on the part of the defendants, but the cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act. As previously pointed out, that fact occurred in Kentucky. We believe the decisions are closely in point.

We can not agree with appellee's contention that the cause of action arose in the United States and not in any state thereof. The distinction urged upon us by counsel seems highly theoretical and to disregard the fact that the United States as a geographical unit comprises the 48 separate states and the District of Columbia. If the critical act occurred within the geographical limits of the United States it necessarily occurred within the geographical limits of one of the 48 states or the District of Columbia. In this case the liability is created by a law of the United States, rather than by the law of Kentucky or of any other state, but the cause of action arose through a combination of that law and the failure to perform the duty imposed by that law. The failure to perform the required duty occurred in Kentucky, not in the United States generally without occurring in any of the subdivisions thereof.

The judgment of the District Court is reversed and the cause remanded for further proceedings consistent with the views expressed herein.

PETITION FOR REHEARING

(Filed July 12, 1946)

Now comes A. M. Anderson, Receiver of the National Bank of Kentucky, appellee herein, and petitions this Court to grant a rehearing and in support thereof respectfully submits that the Court is in error in the opinion entered June 24, 1946, in its conclusion that appellee's cause of action arose in Kentucky.

The Court (Op. p. 5) defines cause of action as "the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf." That definition is satisfactory with respect to a theoretical cause or right of action but in securing "judicial interference" a litigant must

present facts entitling him to relief, to a court having jurisdiction of the parties.

The Supreme Court in *Bradford* v. *Southern Railway*, 195 U. S. 243, 248, said: "Lord Coke defined the word 'action' to be 'a legal demand of one's right,' and cause of action comprises every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse. *Railway Co.* v. *Dixon*, 179 U. S. 131, 139." See also *Martin* v. *Norfolk & Western R. R. Co.*, 43 Fed. (2d) 293, 295.

There is nothing in appellee's bill of complaint, or any of the numerous motions and answers filed by appellants, concerning failure to pay at any time or place. That was not an essential fact in plaintiff's cause of action and was first brought into the case by way of argument and for the purpose of making analogous definitions of "cause of action" from contract and tort cases.

The opinion continues (p. 5) with a statement that a cause of action arises at the place where the operative facts occur and that it is the happening of the last of such facts which brings the cause of action into existence. "Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible." See *Brown* v. *O'Keefe*, 300 U. S. 598, 603." But in that case the court said:

> "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one presently enforcible as soon as a qualified claimant appears upon the scene."

The qualified claimant is of course the receiver. The last "critical event" requisite to a "presently enforcible" right is a qualified claimant. Failure to respond is not a fact or a critical event with respect to a receiver's cause of action.

The opinion also states that a promissory note creates

a liability but does not become a cause of action until "the note matures and the maker fails to pay." The maker's failure to pay is not part of the holder's cause of action. Demand and nonpayment are not essential allegations of plaintiff's cause of action on a promissory note. *31 O. Jur., Payment, Sec. 174, p. 245; Worst* v. *Bank,* 11 O. App., 308, 313. A cause of action on a note accrues *when* maturity arrives, and *where* it is by its terms payable. If there be no agreed place for payment the cause of action arises *where* the contract was made.

The opinion (p. 6) enumerates the operative facts in the present case, omitting one very important one and including one presented wholly by way of argument. Those elements are said to be (1) Federal statute; (2) insolvency of the bank; (3) assessment; (4) the maturity of the assessment "by the passage of time to April 1, 1931; and (5) "the defendants have failed to make payment on or before that time."

No case can be found suggesting that a stockholder's failure to make payment at the end of the grace period allowed him by the Comptroller is a fact to be alleged and proven by the Receiver in carrying out his statutory duty to "enforce" shareholders liability, except the decision by the District Court of Pennsylvania in *Anderson* v. *Andrews,* 62 Fed. Supp. 705, which has been submitted to the Third Circuit Court of Appeals for decision in the Receiver's appeal.

The whole dispute in *Anderson* v. *Abbott* was the identification of holding company stockholders as owners of intangible personal property representing stock of the National Bank of Kentucky. Their liability attached upon their acquisition of the Delaware holding company's stock. Section 73 of the Delaware Corporation Law provides that the situs of that ownership "for all purposes," except taxation, was Delaware. For purposes of taxation its situs

was Ohio. 51 Am. Jur., Taxation, Secs. 496, 497. *Bouree v. Trust Francais,* 14 Del. Ch. 332, 127 A. 56. If we concede what appellants have so stoutly maintained, that their liability is based on a contract, then the analogy of the contract cases under conflict of laws is pertinent and contrary to this Court's opinion. When a person subjects himself to liability on a contract, not specifying a place for performance, the law of the place where it is made determines the obligation and the duty imposed on the obligator, and the cause of action arises there because the liability had its inception there. Appellants' "contract" was not made in Kentucky. They assumed their liability under the laws of the United States and, if there must be a place in the United States also within a state, where liability was contracted, that place was either Ohio or Delaware.

Having narrowed the issue to the determination of "where the failure to pay the assessment ordered in the present case occurred" the opinion (p. 6) answers that question solely by reference to the notice the Receiver sent the appellants on March 20, 1931. Conceding that the Receiver was not expressly authorized by the Comptroller's direction to enforce the assessment, to "designate" or to "fix" a place for payment, the opinion concludes that the Comptroller's authority was broad enough "to include the designation of a place of payment as well as the time of payment, in the absence of any such contrary designation in the contract between the parties." It was, of course, logical and reasonable for the Receiver to request payment at his office. But that is an entirely different matter from finding the Receiver empowered by law to "fix" or to "designate" a place for the performance of this "contract," without the assent of the other parties.

The Receiver was the statutory agent to enforce the stockholders' obligation to pay the assessment. No authority can be found and no logical reason is suggested for

the conclusion that the Receiver could, unilaterally, fix a place for performance of appellants' duty to pay. Surely asking for payment in Louisville would be as ineffectual in fixing a place for performance as it was in securing it from these stockholders.

Not only did the Receiver have no right to modify appellants' obligation in this regard, he did not even attempt to do so, as repeatedly decided by this Court. The notice referred to has been discussed by this Court in *Anderson* v. *Abbott*, 127 Fed. (2d) 696, 699, where it was said:

> "On March 20, 1931 the receiver of the national bank notified the stockholders of BancoKentucky Company that it was his intention to proceed against them for the collection of the assessment liability represented by trustees participation certificates held by the Banco-Kentucky Company to the extent that he should be unable to collect such assessment from the Banco-Kentucky Company or its receiver."

Again in *Abell* v. *Anderson*, 148 Fed. (2d) 372, this Court said:

> "In March, 1931, the Bank's receiver notified the shareholders of Banco that he had demanded payment of the assessment from Banco's receiver, and also that he intended to proceed against them to the extent that he was unable to collect from Banco."

That was substantially the language of the Supreme Court in *Anderson* v. *Abbott*, 321 U. S. 349, 354. The only purpose of that notice was to preserve appellee's rights against Banco shareholders while pursuing the holding company. See *Anderson* v. *Atkinson*, 22 Fed. Supp. 853, 855.

The opinion attributes to this notice an interpretation which it will not sustain, contrary to the Court's earlier interpretation and reaches a result for which there is no legal basis even though the present interpretation were correct.

Where a person has incurred a liability to pay money generally and there is no place agreed upon for performance, it is the debtor's duty to seek out the creditor but only when the parties are residents of the same state. Where, as here, the parties reside in different states, the creditor must go to the debtor. *Hale* v. *Patton*, 50 N. Y. 233, 48 C. J., Payment, pp. 592, 593; 40 Am. Jur., Payment, Sec. 17, p. 723, Sec. 18, p. 724.

Had the Receiver and the Comptroller purported to make demand upon appellants for payment of the assessment, in Kentucky, before it was due under the Comptroller's order, April 1, 1931, such demand would have been premature. In *Fisher* v. *Whiton*, 317 U. S. 217, it was held that, not only did the Receiver not have a complete and present cause of action until the date fixed by the Comptroller for the assessment's payment, but until that time he had no right to demand payment.

The period from the date the assessment was levied until it became payable was merely a grace period allowed by the Comptroller. *Strassburger* v. *Schram*, 93 Fed. (2d) 248, and *Reich* v. *Van Dyke*, 107 Fed. (2d) 682. Stockholders are not entitled to such a grace period as a matter of right. It is unnecessary that they even receive notice of assessment. *Brown* v. *Ellis*, 103 Fed. 834; *Rankin* v. *Miller*, 207 Fed. 602, 611. Only one fact occurred subsequent to the order of assessment which had any connection with plaintiff's cause of action, the arrival of April 1, 1931, which cannot be confined to Kentucky. See *Rawlings* v. *Ray*, 312 U. S. 96, 99, and the Court's comments on *Pufahl* v. *Estate of Parks*, 299 U. S. 217.

Aside from the fact that the three cases cited on page 8 of the opinion were suits for damages arising from wrongful acts, we wish to point out another distinction. In each of those cases the plaintiff had an opportunity of suing the wrongdoer in the state whose period of limitations was

borrowed and the inference is justified that the forum of suit was selected for the advantage of a longer period of limitations.

In this case appellants were never suable in Kentucky. They became potentially liable outside of Kentucky when they acquired Banco stock. That liability matured into a presently enforcible right upon the levying of the assessment and the arrival of April 1, 1931. Appellants' cause of action and right of action were complete on that date. Appellee then became entitled to "judicial interference in his behalf." He could not secure judicial interference in Kentucky but was compelled to seek it in Ohio. Judicial interference is an empty thing if there is no court available to enforce it.

> "From practical considerations, it has been held that a cause of action does not arise at a place where, because of the defendant's absence, no right could be enforced, and hence the statute admitting the bar of the place where the action arose applies the bar of a defendant's residence. . . ."
>
> "All of the foregoing principles are subject to the indispensable preliminary factor that a statute admitting the bar of another state should not be held to supply a defense if in fact the courts of such other state have not been in a position to afford relief." 11 Am. Jur., Conflict of Laws, Sec. 197.

The opinion concedes that appellants' liability exists without fault (p. 8) but states that the "cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act. As previously pointed out, that fact occurred in Kentucky."

We do not believe that, in describing a stockholder's obligation to respond to an assessment as liability with

out fault, the Supreme Court in *Anderson* v. *Abbott* was discussing an immature potential liability as distinguished from a cause of action. The Supreme Court was discussing the liability of BancoKentucky stockholders in a suit to enforce payment of the assessment and not their status before the bank failed.

It is difficult to understand how the failure to perform a legal duty at the time required can be the equivalent of an affirmative act of wrongdoing in the sense of "*place where.*" Appellants simply failed and neglected to pay. They never agreed to pay any place. In fact, they relied on their stock certificates as a negation of any obligation to pay. An affirmative act has location. An absence of action has none. Both may permit a suit but an omission of a duty has no location where none is agreed upon.

We believe the Court to be in error in its statement that, had a stockholder paid the Receiver prior to April 1, 1931 (p. 6), no cause of action of the kind herein sought to be enforced would have at any time arisen or existed against him. If that be true a necessary allegation in plaintiff's suit to state a cause of action would be that the defendants had failed to pay. The fact of payment must be affirmatively pleaded at common law and under the pleading codes it has generally been held that evidence of payment may not be offered unless specially pleaded, even in cases where a plaintiff has alleged nonpayment. Ann. 100 A. L. R. 264. *Kalloch* v. *Hoagland*, 239 Fed. 252 (C. C. A. 6, 1917). Rule VIII of the Federal rules is to the same effect, requiring a defendant to affirmatively plead the defense of the statute of limitations, payment, etc. Since payment is purely defensive, failure to pay cannot be part of a plaintiff's cause of action.

The effect of this decision, that appellants' failure to pay was a critical event and the last operative fact essential to appellee's cause of action, is to hold that his failure

to negative a nonexistent defense resulted in his not presenting a cause of action.

We submit that there is nothing highly theoretical about appellee's contention that the cause of action arose in the "country," the laws of which provide no period of limitations to be borrowed under the Ohio statute. Plaintiff's cause of action and right of action involved only two ultimate facts, namely, appellants' ownership of property subjecting them to liability and the necessity of enforcing that liability to pay depositors. The assessment itself was a quasi judicial determination by the Comptroller. The only traversable fact was appellants' status as shareholders under the National Bank Act. The law of the country, plus that status, presented an actionable right. The actionable quality or nature of acts resulting in tort or contract liability are determined with reference to the *lex* loci, the local *law*. It is the *law* that governs and in this case it is the law of the United States, not that of Kentucky, which governs appellee's cause of action.

It is respectfully petitioned that a rehearing be granted.

Respectfully submitted,

ROBERT S. MARX,
FRANK E. WOOD,
WILLIAM C. KELLY,
HARRY KASPIR,
Attorneys for Appellee.

ORDER DENYING REHEARING

(Filed August 19, 1946)

Appellee's Petition for Rehearing having been considered by the Court,

IT IS ORDERED that the same be and is now overruled.

CERTIFICATE OF COUNSEL

I, Frank E. Wood, of counsel for the above named A. M. Anderson, Receiver of National Bank of Kentucky, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FRANK E. WOOD,

Of Counsel for Receiver, A. M. Anderson.

CLERK'S CERTIFICATE

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Lawrence S. Helmers, et al.* v. *A. M. Anderson*, Receiver, No. 10,198, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed by name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 22nd day of October, A. D. 1946.

(s) J. W. MENZIES,

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 656

ORDER ALLOWING CERTIORARI—Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 593.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.